

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
1866ICPayday.com, L.L.C.,)	Date: July 21, 2009
)	
Petitioner,)	
)	
- v. -)	Docket No. C-09-259
)	Decision No. CR1976
Centers for Medicare & Medicaid)	
Services.)	
)	

DECISION

I sustain the determination of the National Supplier Clearinghouse (NSC)¹ and the Centers for Medicare & Medicaid Services (CMS) to revoke the Medicare supplier number of Petitioner 1866ICPayday.com, L.L.C.²

I. Procedural Background

Prior to the revocation at issue in this case Petitioner was enrolled in the Medicare program as a supplier of durable medical equipment, prosthetics, orthotics and supplies (DMEPOS). Petitioner's supplier number was revoked by NSC based on an NSC investigator's findings during an on-site visit on May 29, 2008. NSC notified Petitioner

¹ NSC is the entity authorized by CMS to issue, revoke, and reinstate DMEPOS supplier numbers. 42 C.F.R. §§ 405.874(a); 421.210(e)(3); *see* 57 Fed. Reg. 27,290 (June 18, 1992); 58 Fed Reg. 60,789 (Nov. 18, 1993).

² Petitioner's distinctive name is an internet website address, and reference to its website is illuminating. Petitioner is an interstate payday loan company, with two offices in New Jersey, one in Pennsylvania, and one – the one before me now – in Texas. I express, of course, no view as to whether a payday loan company is a suitable vehicle for supplying specialized medical equipment to those whose infirmities might leave them compromised financially.

by noticed dated July 30, 2008, that it was in violation of supplier standards 1, 4, 5, 7, 12, and 14. The notice also afforded Petitioner an opportunity to provide additional information as to its compliance. CMS Exhibit (CMS Ex.) 3. The letter was subsequently returned as “unclaimed.” CMS Ex. 4. On November 25, 2008, NSC wrote to Petitioner revoking Petitioner’s Medicare supplier number. P. Ex. 2. The NSC notice gave as grounds for revocation the charge that Petitioner was in violation of supplier standards 1, 4, 5, 7, 9,³ 12 and 14. *Id.*

By letter dated December 20, 2008, Petitioner requested reconsideration to contest NSC’s determination. P. Ex. 10, at 1. The Medicare Hearing Officer conducted an on-the-record hearing and determined that based on documentation submitted to NSC in the reconsideration request, Petitioner was in compliance with supplier standards 1, 4, 5, and 14 prior to the on-the-record review, but was not in compliance at the time of the revocation of its provider number with supplier standards 7, 9, and 12. Based on her findings, the Hearing Officer determined that the denial of Petitioner’s Medicare supplier number was appropriate. On January 14, 2009, the Hearing Officer issued her decision.⁴ CMS Ex. 10; P. Ex. 1.

By letter dated February 13, 2009, Petitioner timely requested a hearing and perfected its appeal of the Hearing Officer’s decision. I convened a telephone prehearing conference on March 9, 2009, in order to discuss the issues presented by the case and procedures for addressing those issues. I told the parties that based upon my review of the file, it appeared that the issues could be addressed in summary fashion, and I established a schedule for further development of the evidentiary record and the filing of briefs. The substance of the prehearing conference is memorialized in my Order of March 11, 2009.

On March 31, 2009, CMS timely filed its Motion for Summary Disposition and supporting Brief-in-Chief (CMS Br.) and proffered CMS Exhibits 1-13 (CMS Exs. 1-13). On April 22, 2009, Petitioner timely filed its Answer Brief (P. Br.) and proffered

³ Supplier standard 9 was not identified in NSC’s July 30, 2008 notice to Petitioner, but is listed as a basis for the revocation of Petitioner’s supplier number in NSC’s notice to Petitioner dated November 25, 2008. *Compare* CMS Ex. 3 (July 30, 2008 NSC notice) *with* P. Ex. 2 (November 25, 2008 NSC notice). Petitioner was not prejudiced by the omission as it had sufficient notice by NSC’s November 25, 2008 letter and opportunity to present evidence to the Hearing Officer regarding supplier standard 9.

⁴ I observe that the Hearing Officer’s decision is dated January 14, 2008 rather than January 14, 2009. Neither party has raised this as an issue which would bring into question the timely filing of Petitioner’s request for hearing. However, I find that the wrong year listed on the decision is likely a typographical error and, therefore, January 14, 2009 is the correct date for the issuance of the Hearing Officer’s decision. *See* CMS Ex. 10; P. Ex. 1.

Petitioner's Exhibits 1-11 (P. Exs. 1-11). CMS filed a Reply Brief (CMS Reply) on April 24, 2009. All briefing is now complete, and the record in this case is closed. The evidentiary record before me on which I decide the issue contains the parties' pleadings and admitted exhibits CMS Exs. 1-13 and P. Exs. 1-5 and 7-11.

II. Issue

The issue in this case is whether NSC and CMS had a basis to revoke Petitioner's Medicare supplier number.

III. Controlling Statutes and Regulations

Pursuant to section 1834(j)(1)(A) of the Act, a supplier of medical equipment and supplies may not be paid for items provided to an eligible beneficiary unless the supplier has a supplier number issued by the Secretary. In order to participate in Medicare as a DMEPOS supplier and obtain a supplier number, an entity must meet the 25 standards specified at 42 C.F.R. § 424.57(c)(1) through (25). If a supplier is subsequently found not to meet the standards, NSC must revoke the supplier's number, effective 15 days⁵ after NSC mails the notice of revocation. 42 C.F.R. § 405.874(b). Standard 7 sets the requirements for a supplier's physical facility and provides that the location "must contain space for storing business records including the supplier's delivery, maintenance, and beneficiary communication records." 42 C.F.R. § 424.57(c)(7). Standard 9 sets the requirements for a supplier as to how the beneficiary can contact the supplier and provides that a supplier "[m]aintains a primary business phone listed under the name of the business . . . furnish information to beneficiaries at the time or delivery of items on how the beneficiary can contact the supplier by telephone" and prohibits "[t]he exclusive use of a beeper number, answering service, pager, facsimile machine, car phone, or an answering machine" as the primary business number. 42 C.F.R. § 424.57(c)(9). Standard 12 requires, in relevant part, that the supplier "must document that it or another qualified party has at an appropriate time, provided beneficiaries with necessary information and instructions on how to use Medicare-covered items safely and effectively". 42 C.F.R. § 424.57(c)(12).

Revocation of a supplier's billing privileges is governed by 42 C.F.R. § 424.535. CMS or its contractor NSC, will revoke a supplier's billing privileges (i.e. supplier number) if the supplier does not meet the standards in 42 C.F.R. § 424.57(b) and (c). 42 C.F.R.

⁵ The regulation at 42 C.F.R. § 405.874 was amended in 2008, making the effective date of a revocation 30 days, rather than 15 days, from the mailing of the notice. As this change became effective August 26, 2008, it does not apply to the effective date of Petitioner's supplier number revocation. 42 C.F.R. § 405.874(b)(2); *see* 73 Fed. Reg. 36,460 (June 27, 2008).

§ 424.57(d). CMS may use an on-site review to determine whether a “supplier is no longer operational to furnish Medicare covered items or services, or is not meeting Medicare enrollment requirements” 42 C.F.R. § 424.535(a)(5). A supplier is operational when “the provider or supplier has a qualified physical location, is open to the public for the purpose of providing health care related services, is prepared to submit valid Medicare claims, and is properly staffed, equipped, and stocked . . . to furnish these items or services.” 42 C.F.R. § 424.502.

The procedures for hearings and appeal are set out in 42 C.F.R. Part 498. Section 1866(j)(2) of the Act allows suppliers appeal rights described in section 1866(h)(1)(A) of the Act. The hearing before an Administrative Law Judge (ALJ) is a *de novo* proceeding. In cases subject to Part 498, the Departmental Appeals Board (Board) has found that CMS must establish a *prima facie* showing of a regulatory non-compliance and the regulated entity then bears the burden of showing by a preponderance of the evidence that it was compliant with the Act or regulations, or that it had a defense. *Batavia Nursing and Convalescent Center*, DAB No. 1904 (2004); *Batavia Nursing and Convalescent Inn*, DAB No. 1911 (2004); *Emerald Oaks*, DAB No. 1800 (2001); *Cross Creek Health Care Center*, DAB No. 1665 (1998); *Evergreene Nursing Care Center*, DAB No. 2069 (2007). The Board has found this allocation of the burden of going forward with the evidence and the burden of persuasion properly applied in the DMEPOS supplier cases. *MediSource Corporation*, DAB No. 2011, at 2-3 (2006). The parties have urged no different allocation in this case.

IV. Findings and Conclusions

I find and conclude as follows:

1. Mark D. Porter, an investigator employed by NSC, conducted an on-site inspection of Petitioner’s business facility, located at 1801 S. Dairy Ashford Street, Suite 104, Houston, Texas, on May 29, 2008. CMS Ex. 1, at 3, 8.
2. Petitioner was not in compliance with supplier standard 9 during the on-site visit on May 29, 2008.
3. Petitioner was not in compliance with supplier standard 12 during the on-site visit on May 29, 2008.
4. The inspection conducted on May 29, 2008, established a basis for revocation of Petitioner’s supplier number. 42 C.F.R. §§ 424.57(d), 424.535(a)(1) and (a)(5).
5. Following the on-site inspection on May 29, 2008, Petitioner was notified by letter dated July 30, 2008 that its facility was found to be in violation of one or more of the 25 supplier standards. CMS Ex. 3.

6. By notice dated November 25, 2008, CMS notified Petitioner that its supplier number was being revoked. P. Ex. 2.
7. Petitioner's billing number must be revoked pursuant to 42 C.F.R. § 424.57(d). *See also*, 42 C.F.R. § 424.535(a)(1).
8. There are no disputed issues of material fact and summary disposition is therefore appropriate in this matter. *Brightview Care Center*, DAB No. 2132 (2007); *Residence at Kensington Place*, DAB No. 1963 (2005); *Community Hospital of Long Beach*, DAB No. 1928 (2004); *Lebanon Nursing and Rehabilitation Center*, DAB No. 1918 (2004).

V. Discussion

The supplier standards at issue before me are set forth at 42 C.F.R. § 424.57(c)(7), (9), and (12).

The regulation is clear on its face that a DMEPOS supplier must meet the 25 standards specified in 42 C.F.R. § 424.57(c)(1) through (25) in order to qualify for billing privileges as a Medicare supplier. The regulation states that a “supplier *must* meet and *must* certify in its application for billing privileges *that it meets and will continue to meet*” the standards. 42 C.F.R. § 424.57(c) (emphasis added). If a supplier is found to be not in compliance with even one of the 25 standards, then a basis exists for revocation of the supplier's billing number. Because I have determined – and as I shall discuss below – that Petitioner was not in compliance with supplier standards 9 and 12, I need not address Petitioner's compliance with standard 7, for Petitioner's non-compliance with two of the standards provided a sufficient basis for NSC to have revoked Petitioner's billing privileges.⁶

I discuss my findings for supplier standards 9 and 12 below in each lettered heading.

A. Petitioner was not in compliance with supplier standard 9 during the on-site inspection on May 29, 2008.

Standard 9 sets the requirements for a supplier as to how the beneficiary can contact the supplier. The standard provides that a supplier:

⁶ Since I shall not address supplier standard 7 in this discussion, I need not address here Petitioner's argument that CMS waived the issue since it chose to not pursue summary disposition on supplier standard 7, nor need I rule on the objections CMS raises as to Petitioner's Exhibit 6, for that exhibit relates only to supplier standard 7. P. Br. at 4; CMS Reply at 4.

Maintains a primary business phone listed under the name of the business locally or toll-free for beneficiaries. The supplier must furnish information to beneficiaries at the time of delivery of items on how the beneficiary can contact the supplier by telephone. The exclusive use of a beeper number, answering service, pager, facsimile machine, car phone, or an answering machine may not be used as the primary business telephone for purposes of this regulation.

42 C.F.R. § 424.57(c)(9); *see also*, 65 Fed. Reg. 60366, 60371 (Oct. 11, 2000).

To verify its compliance with supplier standard 9, Petitioner proffered to the Hearing Officer a copy of its listing in the Yellow Book phone directory identifying Petitioner's phone number as 281-679-1680. After review of the document and the case file, the Hearing Officer found that Petitioner had failed to present evidence substantiating its compliance with supplier standard 9, stating:

However, after careful review of the case file, and the CMS 855S on file with the NSC, it lists the telephone number as 832-884-0498, and the fax number as 281-679-1680. WhitePages.com records indicate the number 832-884-0498 as of January 7, 2009 is a cell phone number and not available for information.

P. Ex. 1, at 3.

CMS points out that NSC warned suppliers, in its 2002 and 2003 newsletters, that cell phones, cell phone numbers, and telephone-pager numbers were not acceptable. CMS submits as support for this assertion CMS Ex. 11 which consists of a document titled "NSC NEWS", dated October 2002. The newsletter issued by Palmetto GBA advises suppliers that a supplier number can be revoked if "[t]he supplier is running a business using a cell phone and/or pager with no business phone number set up." CMS Ex. 11, at 2, 4. CMS Ex. 12 is also a newsletter issued by Palmetto GBA, dated June 2003, which provides a listing of the standards a supplier must meet or face revocation of its supplier number. Under the category listing titled in bold print "CMS MEDICARE DMEPOS SUPPLIER STANDARDS", the newsletter contains the following reference to supplier standard 9:

9. A supplier must maintain a primary business telephone listed under the name of the business in a local directory or a toll free number available through directory assistance. The exclusive use of a beeper, answering machine or *cell phone* is prohibited.

CMS Ex. 12, at 5 (emphasis added). CMS also states that NSC published on its website an “abbreviated version” of the supplier standards making the general point at issue in this part of my decision. CMS Ex. 13, at 1, 3.

Although Petitioner maintained that its business phone number was 281-679-1680, the Hearing Officer determined that there was sufficient evidence before her to find that 832-884-0498 was Petitioner’s telephone number and 281-679-1680 was Petitioner’s fax number. The Hearing Officer further concluded that as of January 7, 2009, the 832-884-0498 number was a cell phone number. P. Ex. 1, at 3.

CMS argues before me that there is “an overwhelming abundance of evidence” that Petitioner used as its primary business phone 832-884-0498, and as its fax number 281-679-1680. CMS Br. at 6. CMS directs me to the following evidence to support its assertion:

- CMS Ex. 1 – which contains copies of completed delivery forms obtained by the site inspector on May 29, 2008. Under Petitioner’s name on each of these forms the phone number 832-884-0498 is listed. CMS Ex. 1, at 9-11.
- CMS Ex. 5 – which is a copy of Petitioner’s CMS-855S⁷ application, dated August 1, 2006. The application lists 832-884-0498 as Petitioner’s telephone number and 281-679-1680 as Petitioner’s fax number.
- CMS Ex. 7 – which is a copy of the Texas Franchise Tax Public Information Report for Petitioner, dated April 16, 2007 and signed by Lawrence T. Tyler. The document lists Petitioner’s “Daytime phone” as 832-884-0498.
- CMS Ex. 8 – which contains downloaded documents from medical supplier listing service websites. All of the documents from 11 different medical suppliers were downloaded on March 27, 2009, and each lists 832-884-0498 as Petitioner’s telephone number (CMS Ex. 8, at 1-21). Additionally, the exhibit includes copies of documents from several of Petitioner’s wholesale suppliers, all of which list Petitioner’s telephone number as 832-884-0498 and fax number as 281-679-1680 (CMS Ex. 8, at 22, 25-28). The exhibit also contains copies of documents Petitioner faxed from 281-679-1680 (CMS Ex. 8, at 23, 24, 29-31).

The evidence in the record before me provides conclusive proof that Petitioner used 832-884-0498 as its primary business number and 281-679-1680 as its fax number. Petitioner

⁷ CMS-855S is a CMS form titled “Application for DMEPOS Suppliers” and serves as a supplier’s initial application for a Medicare supplier number.

does not dispute that 832-844-0498 is a cell phone number. Neither a cell phone nor a facsimile machine suffices to meet the requirements of standard 9. The regulation specifically prohibits the “exclusive use of a beeper number, answering service, pager, facsimile machine, car phone, or an answering machine” as the primary business number, and suppliers were provided ample notice from NSC that a supplier number could be revoked as failure to comply with supplier standard 9 based on a supplier’s use of a cell phone number as its primary business number. CMS Ex. 11, at 4, 2; CMS Ex. 12, at 5.

Petitioner provided a declaration from Lawrence Tyler, the manager of 1866ICPday.com. P. Ex. 11. In his declaration, Mr. Tyler asserts that the documents contained in P. Ex. 4 are “*prima facie* proof of compliance” with standard 9. He contends that these documents establish that “the primary business telephone listed under 1866ICPayday.com L.L.C. is (281) 679-1680”. *Id.* at 9. A review of P. Ex. 4 shows that it contains three documents. The first is an apparently-downloaded internet page titled “yellowbook” which contains Petitioner’s name, its address and a local number listed as “281-679-1680”. The second document is a similar page, a YELLOWPAGES.COM listing indicating Petitioner’s contact number as “(281) 679-1680”. The third document, another downloaded internet page, is from WhitePages.com and also indicates Petitioner’s contact number as “(281) 679-1680”. P. Ex. 4, at 1-3. Mr. Tyler’s declaration may be bold, but it is conspicuously incomplete, for not one of these three references conveys any information whatsoever about the nature of the listed number, that is, whether the instrument to which the number is assigned is a conventional telephone, a cell phone, a pager, or a facsimile machine. Mr. Taylor’s declaration is patently insufficient to raise a genuine issue of material fact in response to CMS’s well-documented assertions.

Although Petitioner now asserts that the number listed is a conventional telephone connection or “landline,” the evidence presented by CMS establishes that 281- 679-1680 was Petitioner’s fax number (CMS Ex. 5; CMS Ex. 8, at 22, 25-28) and that 832-884-0498 was used by Petitioner as its primary business number (CMS Ex. 1; CMS Ex. 5; CMS Ex. 7; CMS Ex. 8). I find Mr. Tyler’s suggestion that 281-679-1680 is a conventional telephone connection or “landline” utterly unsupported by any evidence in this record, and I specifically find that Mr. Tyler’s unsupported and uncorroborated assertions, and any inferences that I might reasonably draw from them, do not create a genuine issue of material fact as to whether 832-884-0498 was used by Petitioner as its primary business telephone number. I have applied the *Brightview Care Center* test⁸ to this question, and neither evidence nor inference is sufficient to suggest any other view of this record. I need not weigh evidence, nor need I assign more credibility to some

⁸ In deciding a summary judgment motion, an ALJ may not make credibility determinations or weigh conflicting evidence but must instead view the entire record in the light more favorable to the non-moving party, drawing all reasonable inferences from the evidence in that party’s favor. *Brightview Care Center*, DAB No. 2131, at 9.

elements of the evidence than to others, to find that Petitioner used 832-884-0498, a cell phone number, as its primary business telephone number, and in doing so placed itself in obvious non-compliance with supplier standard 9.

B. Petitioner was not in compliance with supplier standard 12 during the on-site inspection on May 29, 2008.

Standard 12 requires that the supplier:

Must be responsible for the delivery of Medicare covered items to beneficiaries and maintain proof of delivery. (The supplier must document that it or another qualified party has at an appropriate time, provided beneficiaries with necessary information and instructions on how to use Medicare-covered items safely and effectively).

42 C.F.R. § 424.57(c)(12).

In support of its argument that it was in compliance with supplier standard 12, Petitioner provided the Hearing Officer with Purchase Option Letters and patient insurance information signed by beneficiaries. After review of the documents provided, the Hearing Officer found, in somewhat murky language:

The beneficiary has initialized on each of these Purchase Option Letters that are signed and dated, that they, the beneficiary, had been instructed on the use of the equipment, as well as the warranty coverage. However no documentation outlining proper administration of the product has been sent for review to verify what information the patient received.

P. Ex. 1, at 3.

Mr. Tyler declares that the “Officer’s findings and conclusion of non-compliance are directly controverted by the evidence submitted by the DME supplier.” P. Ex. 11, at 4.

A review of those documents, now before me as P. Ex. 5, show 33 documents signed and initialed by each beneficiary attesting to the following statement: “Instruction on the safe and effective use of the equipment was given before the beneficiary start[s] using the equipment on the date below.” The dates on the signed documents are as follows:

6/26/08, 7/1/08, 7/1/08, 7/1/08, 7/2/08, 7/7/08, 7/24/08, 7/31/08, 7/31/08, 8/13/08, 8/13/08, 8/13/08, 8/13/08, 9/30/08, 10/1/08, 10/02/08, 10/2/08, 10/2/08, 10/2/08, 10/3/08, 10/10/08, 10/10/08, 10/10/08, 10/07/08, 10/16/08, 10/16/08, 10/16/08, 10/21/08, 10/21/08, 10/23/08, 11/18/08, and one document was undated.

P. Ex. 5.

Although Petitioner may arguably have produced documents with beneficiaries' signatures indicating that they received instructions on how to use the Medicare-covered items safely and effectively (P. Ex. 5, at 2-69), I need not decide that question. For the plain fact is that the dates on the documents cover the period between June 26 and November 18, 2008, a period of time well after the May 29, 2008 on-site inspection. They are valueless as support for Petitioner's assertion that it was in compliance with supplier standard 12 at the time of the on-site inspection, on May 29, 2008. Thus, CMS's assertion – that Petitioner was not in compliance with supplier standard 12 at the time of that inspection – remains unchallenged. No genuine issue of material fact exists with reference to CMS's assertion. I find that Petitioner did not meet the requirements of supplier standard 12 at the relevant time.

C. Petitioner's constitutional arguments.

Petitioner complains that its "Due Process rights under the Fifth and Fourteenth Amendments to the U. S. Constitution" have been violated in these proceedings and those below. P. Ex. 11, at 15. Petitioner also raises other arguments based on constitutional questions of unlawful taking under TEX. CONST. art. 1, § 19. But Petitioner's constitutional arguments present no issue suitable for my resolution, as they lie beyond my authority to consider. *Wisteria Care Center*, DAB No. 1892 (2003); *Hermina Traeye Memorial Nursing Home*, DAB No. 1810 (2002); *Sentinel Medical Laboratories, Inc.*, DAB No. 1762 (2001). Whatever factual disputes may attend Petitioner's constitutional claims, those facts are not material to the issue over which I exercise jurisdiction.

D. Petitioner's challenge to CMS's exhibits.

Petitioner challenges all of CMS's exhibits. P. Br. at 6-7. Petitioner cites FED. R. CIV. P. 56(e) to support its argument that CMS's exhibits are inadmissible because the documents are not "sworn or certified copies". Petitioner further argues that Mr. Porter's declaration fails to reference or authenticate the exhibits. *Id.* at 7.

Petitioner's objections are unsound. It is well-established in these administrative proceedings that although the Federal Rules of Civil Procedure can be used as guidance, the Rules are not controlling. *See, e.g., Guardian Health Care Center*, DAB No. 1943, at 15 (2004). The Board made clear in *Guardian* that the Administrative Procedure Act, 5 U.S.C. § 556(d), provides the standard for the admission of oral and documentary evidence, and allows an ALJ to admit all evidence with the exception of irrelevant, immaterial, or unduly repetitious material, but obliges the ALJ to consider objections to a document's authenticity or genuineness. Here, Petitioner fails to assert that CMS's exhibits are not authentic or complete. Therefore, I find as fact that they are all reliable,

complete, and authentic. Some are from publicly-available sources. Petitioner's objection is overruled, and CMS Exs. 1-13 are admitted.

E. CMS's challenge to Petitioner's Exhibits 6 and 8.

As part of its proffer of evidence, Petitioner submitted P. Exs. 6 and 8. Neither of these documents was before the Hearing Officer for her review and are now being filed for the first time. CMS objects to both of these documents. CMS Reply at 4.

CMS objects to P. Ex. 6, noting that it is a photo of Petitioner's office. CMS argues that the photo does not accurately depict the room as it existed at the time of the inspection. As I have pointed out above, I am not considering Petitioner's compliance with supplier standard 7 in this decision. Accordingly, I expressly decline to rule on CMS's objection to P. Ex. 6 as that objection has been presented, but I exclude P. Ex. 6 as irrelevant.

CMS also objects to P. Ex. 8. CMS claims that Petitioner fails to provide an explanation of its failure to produce the material at an earlier stage of these proceedings. P. Ex. 8 is a document identified as a "Manufacturer's Instructions on Equipment". The regulations govern a supplier's submission of evidence, and 42 C.F.R. § 405.874(c)(5) addresses the timing of a supplier's presentation of supporting evidence: if the supplier fails to provide evidence before the contractor's Hearing Officer issues a decision, the supplier is precluded from introducing new evidence at higher levels of the appeal process. However, 42 C.F.R. § 498.56(e) allows an ALJ to examine any new evidence submitted by the supplier to determine if some justification exists for the late submission. The documents are relevant to my determination of whether Petitioner was in compliance with the requirements of supplier standard 12. Since that determination is made in the context of summary disposition, and since every reasonable opportunity ought to be extended to Petitioner in making its record in that context, I find good reason to allow Petitioner to submit the evidence for the first time at this level of its appeal. CMS's objection to P. Ex. 8 is overruled, and P. Ex. 8 is admitted.

F. Summary Disposition is appropriate.

Petitioner's hearing rights in this case are governed by 42 C.F.R. Part 498. These regulations do not address explicitly the circumstances under which an ALJ may grant summary disposition or judgment. However, the regulations have been interpreted consistently in this forum and by the Board to allow summary disposition in those circumstances where summary judgment would be appropriate under FED. R. CIV. P. 56(c). Summary disposition is appropriate where there are no disputed issues of material fact and where the only questions that must be decided involve either questions of law or the application of the law to the undisputed facts. *Livingston Care Center*, DAB No. 1871, at 6 (2003).

A party opposing summary disposition must allege facts that, if true, would refute the facts relied upon by the moving party. *See, e.g.*, FED. R. CIV. P. 56(c); *Garden City Medical Center*, DAB No. 1763 (2001); *Everett Rehabilitation and Medical Center*, DAB No. 1628, at 3 (1997). A party may not simply state that it disputes allegations of fact in order to avoid the entry of summary disposition; it must describe the asserted facts sufficiently to establish a genuine dispute as to a material factual issue. In evaluating whether there is a genuine issue as to a material fact, an ALJ must view the facts and the inferences reasonably to be drawn from the facts in the light most favorable to the nonmoving party. *See Pollock v. American Tel. & Tel. Long Lines*, 794 F.2d 860, 864 (3rd. Cir. 1986); *Madison Health Care, Inc.*, DAB No. 1927, at 5-7 (2004). This latter formulation of the summary-disposition principle has been emphasized by the Board in *Brightview Care Center*, DAB No. 2132, and in *Oklahoma Heart Hospital*, DAB No. 2183 (2008). It is at this specific point that Petitioner has failed: no facts have been asserted that would show, or would reasonably support inferences of, a genuine issue of material fact. Having applied the standard I recite above, I find and conclude that CMS is entitled to summary disposition in its favor.

III. Conclusion

For the reasons set out above, I find and conclude that Petitioner's Medicare supplier number was appropriately revoked pursuant to 42 C.F.R. § 424.57(d). The CMS Motion for Summary Disposition should be, and it is, GRANTED.

/s/
Richard J. Smith
Administrative Law Judge